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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN JAMISON DAVIS,

Cross-complainant and Respondent,

v.

THE J. HARTMAN COMPANY et al.,

Cross-defendants and Appellants.

JOHN JAMISON DAVIS et al.,

Plaintiffs and Respondents,

v.

THE J. HARTMAN COMPANY et al.,

Defendants and Appellants;

G051648

(Super. Ct. No. 30-2008-00111045
consol. w/No. 30-2008-000111553)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Law Office of Rosa Kwong and Rosa Kwong for Cross-defendants and Appellants.

The Zacher Firm and Dieter Zacher for Cross-complainants and Respondents.

* * *

Defendants, cross-defendants, and appellants The J. Hartman Company, The Hartman Media Company, and Jason Hartman (collectively Hartman) entered into two relevant contracts with plaintiff, cross-complainant, and respondent John Davis (Davis) in connection with Hartman's real estate consulting business. Hartman also entered into separate agreements with plaintiffs and respondents Marcus P. Meleton, Jr., (Meleton) and Sherman P. Chaplin (Chaplin; with Davis, collectively plaintiffs). When disputes arose, Hartman filed an action against Davis,[1] to which Davis cross-complained and plaintiffs separately sued Hartman.

Ultimately, Davis's cross-complainant was tried by a referee who recommended an award in favor of Davis. He also recommended an offset in favor of Hartman that zeroed out Davis's award. Hartman's subsequent motion for attorney fees was denied.

Hartman appeals, arguing it is the prevailing party. It contends that although the contractual provision for attorney fees applied only to arbitrations, the contract was modified to allow for a recovery of attorney fees; plaintiffs waived any right to object to an award of attorney fees; and plaintiffs' prayer for attorney fees in their complaint was a judicial admission Hartman was entitled to attorney fees.

We conclude there is no basis for an award of attorney fees to Hartman and thus need not reach the issue of whether he is the prevailing party. We affirm the order.

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[1] The Hartman Action was dismissed after Hartman's claims were discharged in Davis's chapter 7 bankruptcy.

FACTS AND PROCEDURAL HISTORY

Hartman provides real estate consulting services. Hartman and Davis entered into contracts, whereby Davis was to provide services to Hartman. Two of the contracts are relevant to this action. One was a Real Estate Agent Independent Contractor Agreement (Agent Agreement) whereby Davis, as an independent contractor, agreed to sell or purchase residential real estate on Hartman's behalf.

The Agent Agreement contained an arbitration clause, which provided "arbitration will proceed, notwithstanding the existence of any . . . complaint or lawsuit instituted by either party . . . ." It also stated "the judge or arbitrator shall award costs to the prevailing party and shall have the right to award reasonable attorney's fees to the prevailing party."

Davis and Hartman also executed an Independent Contractor Consulting Agreement (Consulting Agreement) whereby Davis was to act as an area manager for Hartman. In the Consulting Agreement Davis agreed to indemnify Hartman for any losses, including attorney fees and costs, arising out of Davis's services.

After approximately 18 months, Davis terminated his relationship with Hartman. Hartman subsequently filed an action against Davis (Hartman Action) including claims for misappropriation of trade secrets, unfair competition, breach of contract, and indemnity. In addition to other relief, Hartman sought attorney fees.

The indemnity cause of action was based on claims made by Hartman clients for Davis's negligence in performance of services to them. When the clients made demand on Hartman for return of $25,000 and Davis failed to indemnify Hartman, Hartman tendered the claim to his insurance company. Hartman did not pay the $25,000 deductible, and the insurance company recovered a judgment for that amount plus another approximately $3,000 in fees and costs.

At the same time Hartman filed its complaint, Davis, Meleton, and Chaplin filed a complaint against Hartman (Davis Action) for breach of contract, fraud, and

common counts, seeking payment of commissions. Meleton and Chaplin had each also entered into a Consulting Agreement with Hartman.

Davis also filed a cross-complaint (Davis Cross-complaint) in the Hartman Action, making essentially the same allegations as he made in the Davis Action, seeking his commissions. Hartman's answer to the Davis Cross-complaint contained several affirmative defenses, including a claim for an offset. It asked for attorney fees on the basis of contracts alleged and "principles of fairness and equity."

The two cases were later consolidated.

During the bench trial, the trial judge decided to appoint a referee to hear the lengthy accounting issues in the Davis Cross-complaint.[2] After hearing the matter, the referee found Davis was entitled to not quite $7,000 in commissions. Hartman had argued he had the right to an offset against the award of commissions based on his indemnity claim. The referee declined to hear any evidence as beyond the scope of the reference.

Subsequently, the parties agreed the referee could try all other issues in the Davis Cross-complaint and the Davis Action. The referee made the following recommendations: 1) Meleton's claims in the Davis Action be dismissed for failure to prosecute them; 2) Despite the fact Hartman's $25,000 indemnity judgment against Davis was discharged in bankruptcy, Hartman was entitled to an offset in that amount against Davis's $7,000 award.

The judgment awarded Davis $6,954 against Hartman. It also found Hartman prevailed on his setoff affirmative defense and offset the sum of $25,000 against Davis's judgment. The court awarded "$0" in costs and attorney fees against Davis.

[2] The court also ordered the referee to adjudicate Meleton's claims in the Davis Action if those claims were dismissed by the bankruptcy trustee. On the same day, Chaplin dismissed his causes of action from the Davis Action.

Meleton's complaint against Hartman was dismissed with prejudice and Hartman was awarded "$0" in costs and attorney fees against Meleton. Judgment was entered against Chaplin and in favor of Hartman with an award of approximately $500 in costs and "$0" in attorney fees.

Hartman then filed a motion for attorney fees on the basis of the fee provision in the Agent Agreement and the indemnity provision in the Consulting Agreement. Although conceding the attorney fees provision in the Agent Agreement pertained only when a dispute was arbitrated, not refereed, Hartman argued that as prevailing party it had never waived his right to attorney fees "in an action to resolve a dispute over the contract." Hartman further contended most of Davis's claims were based on the breach of contract claims rather than the common counts, and thus fees in defense were based on the contracts.

In the tentative ruling denying the motion, the court pointed out the Consulting Agreement was not the basis for the Davis Cross-complaint. The court noted Hartman had admitted it waived the right to arbitrate under the Agent Agreement and the attorney fees provision in that agreement provided for an award to the prevailing party in an arbitration only. There was no mention of a fee award where there was a reference. Further, there was nothing in the stipulation for the referee regarding attorney fees. In addition, the referee's notation of $0 for attorney fees at least impliedly stated there was no prevailing party, which made sense because both parties recovered to some degree.

After taking the matter under submission, the court denied the motion, ruling the attorney fees provision in the applicable agreement provided for an award of fees only when a matter was arbitrated, not the case here.

Further, there was no basis to award attorney fees pursuant to the indemnity provision in the Consulting Agreement. Hartman sued for indemnity based on Davis's "mishandling of Hartman clients" and was entitled to $25,000 as indemnity pursuant to the Consulting Agreement. But that claim was discharged in Davis's bankruptcy. As a

result, Hartman's only recourse as to the amount was to claim it as an offset against the approximately $7,000 award recovered by Davis against Hartman.

The court further stated the referee's report and recommendation did not suggest Hartman's indemnity action sought attorney fees as part of the setoff. In addition any attorney fees would have been incurred by Hartman defending against claims by its clients and not incurred in the current action, ruling out any attorney fees award in the current actions.

DISCUSSION

1. Introduction

Under the so-called American rule, the parties to an action are responsible for their own respective attorney fees unless a statute or contract provides to the contrary. (Code Civ. Proc., § 1021; *Tract 19051 Homeowners Assn. v. Kemp.* (2015) 60 Cal.4th 1135, 1142.) Here Hartman does not cite to any statutory authority. He relies instead on the attorney fees provision in the Agent Agreement and perhaps the indemnity provision in the Consulting Agreement. Neither supports his claim.

2. Agent Agreement

The Agent Agreement provided disputes are to be arbitrated, requiring arbitration to "proceed, notwithstanding the existence of any regulatory inquiry, complaint or lawsuit instituted by either party . . . ." It also gave the "judge or arbitrator" "the right to award reasonable attorney's fees to the prevailing party." Both parties agree the Agent Agreement allows for attorney fees only in the event of an arbitration.

Hartman, however, argues there are three bases entitling him to attorney fees despite the fact the action was not arbitrated. First, it claims the Agent Agreement was somehow modified, presumably by the parties' demand for attorney fees in their pleadings.

Second, Hartman maintains Davis waived the right to challenge the request of attorney fees. Hartman points to Davis's reliance on both the Agent Agreement and

the Consulting Agreement in his cross-complaint, claiming that although Davis knew of the arbitration paragraph containing the attorney fees provision, he did not petition for arbitration but voluntarily sued in superior court.

Both of these contentions are premised on the third argument that the request for attorney fees pursuant to statute and contract in the prayer of the Davis Cross-complaint was a judicial admission. Hartman further asserts Davis did not object to Hartman's request for attorney fees in Hartman's answer to the Davis Cross-complaint.

Hartman apparently makes the same claim as to Meleton and Chaplin based on their requests for attorney fees in the Davis Action and their lack of objection to his request for attorney fees in his answer.

Hartman's arguments lack merit.

Allegations of fact in a complaint are judicial admissions and thus """conclusive concessions of the truth of a matter [that] have the effect of removing [them] from the issues."""" (*CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc*. (2008) 160 Cal.App.4th 288, 299-300, fn. 9.) But a prayer is not a factual allegation and is not a "binding judicial admission." (*Ibid*.)

Further, that plaintiffs filed suit rather than an arbitration and prayed for attorney fees is not sufficient to bar them from opposing Hartman's request. That conduct is not a modification of the Agent Agreement. A written contract cannot be so easily modified that any conduct contrary to its provisions changes the terms. The inconsistent conduct must "'warrant the conclusion that the parties intended to modify the written contract.'" (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1038, overruled on another ground in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1182-1183.) Hartman points to no evidence supporting such an intent here.

The filing of a complaint despite the requirement disputes be arbitrated does not evidence an intent to modify a contract. This is done with some regularity and

often is a tactic or a result of a failure to read the contract language. Likewise a prayer in a complaint does not show an intent to modify a contract. Prayers are often nothing more than boilerplate language included in every pleading.

Further Hartman itself filed suit as opposed to seeking arbitration. There is no evidence it intended to modify the Agent Agreement by doing so.

In short, Hartman has failed to show any basis to recover attorney fees based on contract modification, waiver, or a judicial admission.

3. Consulting Agreement

In the Consulting Agreement Davis agreed "to indemnify [Hartman] against, and shall reimburse [Hartman] for, and in respect of any and all claims, demands, losses, cost, expenses, obligations, liabilities, damages, remedies and penalties, including . . . attorneys' fees and expenses that [Hartman] shall incur or suffer and which arise from [and] are attributable to, by reason of or in connection with my acts or omissions . . . ."

Although Hartman cites to this provision in its statement of facts, apparently relying on it in support of his claim, it makes no argument to that effect. Thus he has forfeited any claim based on this provision. (*Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP* (2012) 212 Cal.App.4th 1181, 1196.)

Because there is no contractual or statutory basis on which Hartman is entitled to attorney fees, it does not matter whether Hartman prevailed against plaintiffs and we have no need to reach Hartman's claims on that issue.

DISPOSITION

The postjudgment order is affirmed. Davis, Meleton, and Chaplin are entitled to their costs on appeal.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.